Petition

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF COLORADO,	)	
Plaintiff-Petitioner,	)	PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO
vs.	)	
DAVID SCOTT LEE,	)	
Defendant-Respondent.	)	

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QUESTION PRESENTED FOR REVIEW

Must Miranda Warnings be provided to one in Police custody for a totally unrelated charge before he may be questioned as a mere potential witness-informant regarding a completely different matter.

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JURISDICTIONAL STATEMENT

On June 15, 1981, the Colorado Supreme Court reversed the first degree murder conviction of defendant-respondent, David Scott Lee (hereafter referred to as "defendant" or "Lee"). In so doing, the Colorado high court found that certain extrajudicial statements made by Lee to the police had been unconstitutionally obtained and should be excluded in any retrial. This ruling left in some doubt the admissibility of the fruits of defendant's statements.

On June 29, 1981, petitioner, the People of the State of Colorado, timely requested of the Colorado Supreme Court a rehearing on the suppression issue only. Such request was denied on July 6, 1981.

This petition for a Writ of

Certiorari to the Colorado Supreme Court is authorized under 28U.S.C.A. 1257 and 2101 as well as Rule 17 of the Revised Rules of the Supreme Court of the United States. The manner in which the Colorado Supreme Court determined the admissibility of Lee's statements appears to be in conflict with decisions rendered by the highest appellate court of Indiana (See Johnson v. State, Indiana, 380 N.E. 2d 1236 (1978) and the District of Columbia Court of Appeals (See United States v. Wiggins, 509 F. 2d 454 D.C., 1975).

The question of admissibility of Lee's statements involves an important federal question which has not yet been addressed by this honorable court. In reasoning that Lee's statements were not admissible, the Colorado high court

has likely determined this federal issue in a way probably not in accord with the relevant decisions high tribunal.

That the Colorado Supreme Court based its decision on the suppression issue upon the United States Constitution and this Court's opinions in the interpretation thereof is demonstrated by its lengthy discussion with regard to Lee's statements of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968); and Rhode Island v. Innis, 446 U.S. 291; 100 S. Ct. 1682, 64 L. Ed. 297 (1980).

The State Court, in its opinion, did make a brief reference to Colorado Revised Statutes, 1973, 19-2-102 (3)(c)(I) which reads,

> No statements or admissions of a child made as a result of interrogation of the child by a law enforcement official concerning acts alleged to have been committed by the child which would constitute a crime if committed by an adult shall be admissible in evidence against the child unless a parent, guardian, or legal custodian of the child was present at such interrogation and the child and his parent, guardian, or legal custodian were advised of the child's right to remain silent, that any statements made may be used against him in a court of law, the right of the presence of an attorney during such interrogation, and the right to have counsel appointed if so requested at the time of the interrogation;..." i.d. (emphasis added)

However, said statute could not have formed the basis for the Colorado Supreme Court's opinion because it speaks of interrogation concerning acts alleged to have been committed by the child. In

the instant matter, the trial judge specifically found the defendant was not questioned as a suspect (f.557), but rather as "an informant or person with some information" (f.558), a finding with which the Colorado Appellate Court did not quarrel. Moreover, the Colorado statute is premised on "...the Fifth Amendment Privilege against self-incrimination and....the Sixth Amendment right to Counsel..." (People v. Knapp, Colorado, 808 P.2d 7, 1973). (Please see also: People v. Maynes 193 Colo. 111, 562 P.2d 756 and People v. L.A., Jr. Colo., 609 P.2d 116 (1980).

Petitioner submits that where a state appellate court has misconstrued the thrust and parameters of this courts' decisions on a federal issue of national concern, then this court ought to exercise its discretion by way of a Writ of Certiorari, and intervene.

STATEMENT OF CASE

The defendant, David Scott Lee, was convicted by a jury of first degree murder. The charge arose from the slaying of William Larmore, a stranger to the defendant, as the victim crossed a field while walking home from work. The evidence disclosed that he admitted the shooting as deliberate to several of his young acquaintances (f. 1345, 1438), and described the victim as a "honky" (f. 1327). ie, considering the evidence in the light most favorable to the state, which the jury apparently did, the defendant was determined to have been responsible for a knowing and completely senseless killing.

On appeal, the Colorado Supreme Court ruled a portion of the statute under which the defendant was convicted

unconstitutional, necessitating a new trial. As the issue was sure to arise at retrial, the Colorado Supreme Court also determined that certain extrajudicial statements made by the defendant should have been suppressed because they were made in a custodial setting sans Miranda warnings.

While the substance of Lee's statements formed an important part of the proof, they were perhaps of even greater value for the derivative "evidence" they produced, for several important key witnesses were located as a result of Lee's disclosures. Loss of the statements and the derivative "evidence" may make retrial impossible.

The Colorado Supreme Court did not finally rule on the derivative evidence issue but, rather, following the dictates of Michigan v. Tucker, 417U.S. 433,94

S. Ct. 2357, 41 L. Ed. 2182 (1974); and United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978), ordered the trial court on remand to apply the principles of the aforementioned opinions and, in accordance with the derivative evidence rule, make appropriate determinations of admissibility.

The Order to suppress the defendant's extrajudicial statements reversed the findings of the trial court. The trial court had ruled the statements admissible at a pretrial hearing, finding them to have been voluntary. The Miranda issue was never squarely presented to the trial court, which made no specific finding with regard thereto. Of course, the derivative evidence issue was not addressed at the trial level

(f. 556-559).

At the hearing on the defendant's motion to suppress and at trial, Officer Henry Reeve testified that he initially discussed the murder with the defendant on October 2, 1978 after he had taken the defendant into custody on a bench warrant relating to another minor charge (429). After taking the defendant into custody, the officer, who had had prior contact with the defendant, had a friendly conversation with the defendant, a fifteen year old youth, regarding the defendant's living circumstances and his school situation. The officer, who had been working on a school liaison program (422), indicated concern that the defend-and was "getting off the track;" he volunteered to contact the high school dean and help the defendant get back

into school after the defendant explained that he was not in school because he was not living at home (433-35). After the defendant was booked on the warrant and was awaiting transportation to the juvenile detention center, Officer Reeve realized that a homicide had occurred earlier that afternoon about a block from the location where he had arrested the defendant. Because there were no leads regarding the shooting, the officer decided to ask the defendant if he knew of any neighborhood "talk" regarding the incident (436-38). The defendant told the officer that he had viewed the body with some friends of his and that they had told him that the victim was "the guy that did Richard bad" and that someone named Bug had stated that he "should have killed him."

The defendant also told the officer that Bug was described by another friend as "a bad sniper" and that someone else had told him that Bug had shot the victim and hidden the weapon in a described location. The defendant also stated that the victim had cheated Richard in a dope deal (439-44). At the time of this conversation, Officer Reeve knew no details regarding the shooting, and had no suspects in mind (447).

As a consequence of this conversation, the officer searched the area in which the defendant stated Bug had hidden the weapon, but found nothing (446-49). Several other detectives aided in the search, one of whom, Detective Gurule, requested a photo of the defendant, which Reeve gave him, although

Reeve did not know why Gurule wanted it (451-52).

Officer Reeve then, acting on orders, interviewed the defendant a second time at the detention center. The officer "had no feeling that he was actually involved in the commission of the crime" and felt he was involved "only in the sense that he had information about it." (453-54.) At the second interview, the officer repeated to the defendant that he would do whatever he could to help him if the defendant supplied useful information regarding the shooting (456-57). This offer related to helping the defendant on the pending charge for which he was in detention (496-97), not the subsequent murder charge, regarding which the defendant was not even suspected at that

time. At this interview, the defendant identified several friends involved in the conversation regarding the shooting, and also stated that the killer, Bug, had given him some bullets to hide, which he had thrown in the grass at a park. The defendant stated that he felt he could get more information from certain people, but also indicated some reluctance to "get any more involved because he felt that the individuals that were involved in the case would kill him if they knew of his involvement and his relaying these facts." (458-62.)

Later in the evening Officer Gurule informed Officer Reeve that the defendant's photo had been tentatively identified as resembling someone who had been in the area around the time that the shooting occurred (465), which partially

confirmed the defendant's account of events.

On the morning of the next day, October 3, 1978, Officer Reeve found the bullets in the location described by the defendant, which the detective felt corroborated the information supplied by the defendant. That afternoon he again spoke with the defendant, informing him that he would attempt to secure the defendant's release from the detention center, because he felt that the discovery of the bullets corroborated the defendant's information (475). The defendant had not been advised of his Miranda rights at this time because he was not then considered to be a suspect in the murder case. In fact, at this third interview, the defendant was given a yearbook from a local high

school and asked if he could recognize the purported killer, Bug, in the photographs. Although he could not do so (466), he supplied the further information that he had seen Bug shoot and then hide the gun (476-77).

After this interview, Officer Reeve was informed that one of the defendant's friends who had been contacted regarding the shooting had accused the defendant, and that the defendant was now a suspect and was not to be further interviewed (478-80). From that point the defendant made no further statements, nor was he requested to. During the conversation with the defendant prior to his becoming a suspect in the murder case, the defendant expressed some reluctance to provide information about the shooting because

he feared he would be labeled as a "snitch" (f.480, 778, 821). Likewise, Officer Reeve referred to the defendant, in conversations with other police officers, as an "informant" (f.529,537). At no time prior to or during any of the conversations with the defendant did Officer Reeve consider him a suspect (f. 778) and, in fact, so informed the defendant (f. 516).

The trial court found the testimony of Officer Reeve compelling and explicitly found that,

> "There was not a question as to Mr. David Scott Lee's involvement in the case. He was not a suspect at all; he was merely a young person in the neighborhood asked a simple question did he know anything about it. And he was willing to talk about it..." (f. 556,557).

ARGUMENT

ISSUE

Must Miranda Warnings be provided to one in police custody for a totally unrelated charge before he may be questioned as a mere potential witness-informant regarding a completely different matter?

The issue presented for review has not yet been addressed by this honorable court. Four leading cases of this court, however, must necessarily form the corners of any rule by this Court upon the above question. Accordingly, a discussion of each seems appropriate.

Escobedo and Miranda

Since this Court's decision of Escobedo v. Illinois, 372 U.S. 492, 84 S. Ct. 1758, 12 L. Ed. 2d 977 and Miranda v. Arizona, 384 U.S. 436, 86 S.

Ct. 1602, 16 L. Ed 2d 694 (1966), police officers have understood that once a suspect is in custody, he is not to be interrogated as to that offense until he has been advised of his privilege against self-incrimination and his right to counsel and knowingly waived same.

Escobedo, of course, established that when a criminal investigation has focused on an individual, and that individual has been taken into custody, he shall then be provided certain procedural rights.

Wrote Mr. Justice Goldberg,

> "We hold,therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into custody,[1] the police carry out a process of interrogations that lends itself to eliciting in-

> criminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution..." Escobedo v. Illinois, supra, 378 U.S. at 490, 491, 84 S. Ct. at 1765.

Escobedo was, then, directed toward and, indeed, limited to, suspects in custody. It was not intended to inhibit the questioning of mere witnesses or informants for potential leads wherever they may be found,

> "Nothing we have said today affects the powers of the police to investigate 'an unsolved crime'....by gathering information from witnesses and by other 'proper investigative efforts.'.....We hold only that when the process

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[1] Clearly, Escobedo has always required "focus" plus "custody", contrary to the seemingly popular belief that "focus", alone was the test.

> shifts from investigative to accusatory--when its focus is on the accused and its purpose is to elicit a confession--our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."[2] id., 378 U.S. at 492, 84 S. Ct. at 1766.

It is, perhaps, helpful to note, too, that Escobedo regarded interrogation as, "...a process....that leads itself to eliciting incriminating statements..." (378 U.S. at 491, 84 S. Ct. at 1765) and the "purpose" of the process" "...is to elicit a confession.." (378 U.S. at 492, 84 S. Ct. 1766).

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[2] Since Mr. Justice Goldberg did not here mention "custody", it is understandable that confusion soon arose as to whether same was a requirement before Escobedo could be triggered.

With Miranda, this Court did not overrule or supplant Escobedo, it simply refined it.

Wrote Mr. Chief Justice Warren,

> "We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it." (emphasis added) Miranda v. Arizona, 384 U.S. at 442, 86 S. Ct. at 1611.

The factual predicate of Miranda was similar to that of Escobedo,

> "There, as in the four cases before use, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession." (emphasis added) id.,384 U.S. at 440, 86 S. Ct. at 1610.

Miranda addressed "...manifestly unjust methods of interrogating accused persons..." (emphasis added) id., 384 U.S. at 442, 86 S. Ct. at 1611. By way of footnote (4), it defined custodial

interrogation as questioning of a person in custody after the investigation. "....had focused on an accused." id., 384 U.S. at 444, 86 S. Ct. at 1612.

Miranda, at great lengths, discussed various police interrogation tactics which were geared, without exception, toward obtaining a confession. Said Mr. Chief Justice Warren,

> "In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring." id., 384 U.S. at 456, 86 S. Ct. at 1618.

The Miranda Majority was greatly influenced by the seemingly successful procedural practice of other agencies and other countries.[3] The opinion, by footnote (59), quoted approvingly, a

Scottish Judicial decision,

> "The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquire information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centered upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous..." id., 384 U.S. at 489, 86 S. Ct. at 1635.

This court, in Miranda prefaced the textual requirements of the Miranda warning by this statement,

> "Accordingly we hold that an individual held for interrogation must be clearly informed...." (emphasis added) id., 384 U.S. at 471, 86 S. Ct. at 1626.

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[3] The Court referred to the F.B.I. practice and the Uniform Code of Military Justice, both of which provided warnings to suspects. id. 384 U.S. at 483-489, 86 S. Ct. at 1632-1635.

Thus, it is abundantly clear, that the parameters of Escobedo and Miranda extend only to persons in custody who are questioned regarding criminal conduct of which they are suspected. Neither opinion was "....intended to hamper the traditional function of police officers in investigating crime...." id., 384 U.S. at 477, 481; 86 S. Ct. at 1629, 1631. "....general questioning of citizens in the fact-finding process...(was)...not affected ..." id., by either holding.

Mathis

Two years after Miranda, this Court handed down Mathis v. United States, supra, a case the Colorado Supreme Court thought dispositive of the issue at hand. Mathis, however, is necessarily limited by its facts.

The factual basis of Mathis differs markedly from the instant matter, and so, too, did the issue before the court.

In Mathis, the government contended that Miranda did not apply to questioning of a suspect in custody unless he was being held in custody for the very offense for which he was being questioned (as a suspect). ie, in Mathis the question was the relevancy of the reason for the custody. In the case at hand the question is the relevancy of the reason for the questioning. This is not a minor and shadowy" distinction. It is not particulary difficult to see how Mathis flowed from Escobedo and Miranda. It is considerably more difficult, however, to accept the validity of the conclusion of the Colorado Supreme Court reached in this case that Mathis governs the case at hand.

Innis

This Court's recent opinion in Rhode Island v. Innis, supra, addresses the issue of what constitutes interrogation as conceptualized by Miranda. While somewhat helpful to the issue at hand, it is hardly dispositive of it. And even if it were, it is apparent that the Colorado Supreme Court has misapplied the principles enunciated therein.

The Colorado high court, relying on Innis, states,

> "Interrogation occurs when the police use words or engage in actions that are reasonably likely to evoke an incriminating response from the defendant .....The critical inquiry in this case is not whether the police considered the defendant a suspect but, rather, whether the defendant, while in police custody, was exposed to a risk of self-incrimination by police interrogation..." (See p.20,22 of appendix herein).

Indeed, the Colorado court appears to adhere to a misconception that the ultimate incrimination of defendant is conclusive that the defendant "was exposed to a risk of self-incrimination" by the police questioning. Such a view is analagous to sustaining a probable cause search based upon the incriminating evidence that was found.

Innis is not a test of risk, likelihood or retrospect, but rather one of forseeability. ie, should Officer Reeve have "known" (not suspect or guess or speculate) that his conversation with Lee "was reasonably likely to elicit an incriminating response" from him. (id. 100 S. Ct. at 1685, 1689, 1690, 1691). The Colorado Supreme Court failed to apply this forseeability factor in measuring the good faith conduct of

Officer Reeve under the standards of Innis.

Innis, of course, like Escobedo, Miranda and Mathis, involved a suspect in custody who was allegedly questioned about the criminal offense for which he was being detained. It is, therefore, not dispositive of the issue at hand. However, a careful reading of Innis leads one to the unalterable conclusion that "interrogation" necessarily entails the questioning of a suspect and that, conversely, a non-suspect cannot be "interrogated" in a Miranda sense. This must be so because the police can hardly be expected to "know" (not speculate or even suspect) that their actions are reasonably likely to evoke an incriminating response if they do not even "suspect" that the person questioned has committed the criminal offense

of which the police seek information."[4]

Wiggins

Not only has this court not previously addressed the issue at hand, so have few others. From the state's perspective, perhaps the most persuasive and on point of those opinions at least touching on this issue is United States v. Wiggins, 509 F.2d 454 (D.C., 1975).[5] The facts of Wiggins, while not identical,

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[4] But,what if the police ask "did you murder him"? Obviously, then, such a question connotes suspicion and, at least from that point, the person questioned would factually cease to be a non-suspect.

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[5]But please see also: Johnson v. State, Ind.,380 N.E. 2d 1236 (1978); Whitfield v. State,Md. Court of App.,411 A 2d 415 (1980); Cervantes v. Walker, 589 F. 2d 424(9th Cir., 1978); Conn. v. Shepherd, Pa. S.Ct., 409 A. 2d 894 (1979); People v. Thornton, 190 Colo. 397, 547 P.2d 1278(1976); People v. Gladney, 194 Colo. 68, 570 P.2d 231(1977); People v. Downer, 192 Colo., 264, 555 P.2d 835(1976); People v. Cook, 176 Colo. 21, 488 P.2d 895 (1971).

are strikingly similar to those of the case at hand. Wiggins was in custody on a charge of unauthorized use of a vehicle and was participating in a police lineup relative to that charge.

An investigating officer on a murder case, Sgt. Tadle, happened to be present at the lineup and "when they read off Mr. Wiggins' name and address, his address was in the unit block of T Street, Northwest, and I was investigating a homicide that occurred in the unit block of U Street, Northwest, which is only a few blocks,...." (United States v. Wiggins, supra, p.459).

Sgt. Tadle inquired of Wiggins "whether he knew anything." Thus commenced a series of conversations between Sgt. Tadle and Wiggins culminating in Wiggins' confession. On appeal,

Wiggins contended that the failure of the police to advise him of his Miranda rights prior to his initial "interrogation" rendered that and all other statements inadmissible.

Noted Judge Robb, in refusing to suppress Wiggins' statement,

> "In other words, Sgt. Tadle was looking for leads and hoped that Wiggins might be of some assistance. He did not suspect that Wiggins was implicated in the murder and had no reason to do so. In short, he approached Wiggins as a possible witness or source of information; his inquiries were the functional equivalent of '(g)eneral on-the-scene questioning'as to facts surrounding a crime or other general questioning of citizens in the fact-finding process, (384 U.S. at 477, 86 S. Ct. at 1629) which the Miranda decision does not curtail." id., p.459

In suppressing the defendant Lee's statements, the Colorado Supreme Court noted that in Mathis this court had rejected the government's contention that

the Miranda holding applies "only to questioning one who is 'in custody' in connection with the very case under investigation." The Wiggins court, however, distinguished Mathis, saying,

> "In the case at bar, Wiggins was neither a suspect nor a prospective subject (suspect). There was nothing to suggest that the Miranda warnings were required because nothing suggested that Wiggins himself was the guilty man."
> "....(Wiggins) became an informant, albeit an untruthful one, for motives that had nothing to do with his confinement. United States v. Wiggins, supra, p. 459, 460.

The rationale of Wiggins on this issue, is of sounder ground than that of the Colorado appellate court.

CONCLUSION

The concept of "focus", born of Escobedo, yet survives. It is an indispensible element of interrogation as contemplated by Miranda, Mathis and

Innis.

Wrote the Chief Justice,

> "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures....to speak" Miranda v. Illinois, supra, 384 U.S. at 467, 86 S. Ct. at 1624.

Without "focus", there exists no inherently compelling "pressure." No empirical data, no decisions of this honorable court support a conclusion that mere custody, without more, without suspicion, without "focus", provides an inherently coercive environment which would "undermine" an "individual's will" to remain silent when questioned regarding a criminal matter. This must be especially so when that individual has been advised that he was not a suspect (f. 516).

The issue before this court, should certiorari be granted, is of great significance not only to the immediate murder case at hand, but to citizens, courts, attorneys and, most importantly, the police. Indeed, the police of this nation need to know the rules. It is submitted that the interpretation of the Colorado Supreme Court of this issue is contrary to the common practice and belief of American law enforcement in general.

Seventeen years have passed since Escobedo shocked our criminal justice system. The fears expressed in the persuasive dissents of Escobedo and Miranda have unfortunately come to pass, often by the narrowest of margins, this doctrine has continued to expand (eg., Mathis and Brewer v. Williams,

430 U.S. 387, 97 U.S. 385, 51 L. Ed. 2d 424), storming areas completely unforeseen by the majority seventeen years ago in its relentless march on reasonable, effective law enforcement. Escobedo and Miranda have proven to be extravagances that this nation simply cannot afford.

In the broadest sense, certiorari in this matter could provide for a re-examination of Escobedo-Miranda, after seventeen years of experience. In its most restricted sense, certiorari would halt the expansion of Escobedo-Miranda beyond the suspect and into the realm of mere witnesses--or even beyond.

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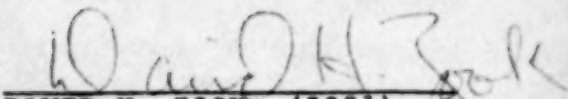

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF

COLORADO

NO. 80SA314

THE PEOPLE OF THE STATE OF COLORADO,	)	
	)	June 15, 1981
Plaintiff-Appellee,	)	
	)	
v.	)	PETITION FOR REHEARING
	)	DENIED
DAVID SCOTT LEE,	)	July 6, 1981
Defendant-Appellant.	)	

Appeal from the District Court

of the

County of El Paso

Honorable William E. Rhodes, Judge

EN BANC JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

JUSTICE QUINN delivered the Opinion of the Court.

The defendant, David Scott Lee (defendant), appeals his conviction based on a general jury verdict of guilty to murder in the first degree. His principal contention is that the statutory definition of extreme indifference murder, which was submitted to the jury for its consideration under the general verdict, is constitutionally infirm. We recently resolved the constitutionality of extreme indifference murder in People v. Marcy, ___Colo. ____, ____P.2d_____(1981)(S. Ct. No. 80SA303, announced March 9, 1981), and, on the basis of that decision, the defendant's conviction must be reversed. Although the defendant asserts several other claims in support of reversal,[1] we address

only two of them. We conclude that the trial court's failure to suppress certain custodial statements made by the defendant to a police officer and prosecutorial misconduct occurring during the trial require a new trial.

Accordingly we reverse and remand.

I. The District Court Proceedings

The defendant, who was then 15 years old,[2] was charged by indictment with murder in the first degree after deliberation[3] as well as extreme indifference murder.[4] The charges arose out of the shooting death of William Larmore on October 2, 1978, in the city of Colorado Springs. Larmore was struck in the abdomen by a bullet while walking home from work. Prior to trial the defendant moved to suppress several custodial statements made by him as well as all

derivative evidence obtained therefrom. The evidence at the suppression hearing established the following sequence of events which are pertinent to this appeal.

On October 2, 1978, the defendant was arrested by Officer Reeve of the Colorado Springs Police Department on an outstanding bench warrant for an unrelated matter.[5] After his arrest the defendant was transported to the Colorado Springs Police Station for standard "booking" procedures. During this process Officer Reeve learned about the Larmore shooting and realized that he had arrested the defendant very close to the location where the shooting occurred. Reeve had a prior contact with the defendant and considered him "street-wise". Not having a

particular suspect, Reeve decided to question the defendant about the shooting. At approximately 6:30 p.m. on the evening of October 2, he asked the defendant, without any warning of rights, what he knew of the shooting. The defendant replied that he was familiar with it but was reluctant to become involved. Reeve then told him that any truthful information he provided would inure to his benefit in the matter for which he had been arrested. Upon further questioning the defendant told Reeve that he played football that afternoon at Van Diest Park with four other boys and that one of the boys, "Bug",[6] had claimed responsibility for the shooting. The defendant described the location where the gun had been concealed. Reeve in-

formed his superior of this information and, pursuant to instructions, made an unsuccessful search for the weapon. Detective Gurule, who was also investigating the shooting, had earlier spoken to a witness who had seen a young black male similar in description to the defendant carrying a rifle case in the area of the shooting. Detective Gurule requested and obtained from Reeve a photograph of the defendant for the stated purpose of conducting a photo-lineup with this witness.

Officer Reeve was instructed to reinterview the defendant, who had been transferred to a juvenile detention center, and to obtain more specific information about the shooting. No. warning of rights preceded the second interrogation. The defendant indentif-

ied by name the individuals with whom he had played football that afternoon. Additionally, he stated that "Bug" gave him some .22 caliber bullets to dispose of and he threw them away at a location near the park where they played ball. The defendant again expressed reluctance to provide information but Officer Reeve assured him he would assist him in gaining release from his present confinement.

After this interrogation Officer Reeve returned to the police station. He there learned from Detective Gurule that a witness had made a photographic identification of the defendant as the young black male who had been seen in the area of the shooting earlier that afternoon. On the following day, October 3, 1978, Officer Reeve drove to

the park and found the discarded bullets which the defendant mentioned in his previous statement.

On the afternoon of October 3 Officer Reeve questioned the defendant for a third time without any warning of rights. The officer gave the defendant a high school year book to examine for the purpose of selecting the photograph of "Bug". The defendant was unable to make a photographic identification but still insisted that "Bug" had shot the victim and the weapon was hidden in the area previously described by the defendant during his first interrogation by Officer Reeve. At the suppression hearing Officer Reeve testified that during all three interrogations he considered the defendant as a witness having possible information of the

shooting and, therefore, believed it unnecessary to advise him of his constitutional rights. For the same reason the officer did not arrange for the defendant's parent to be present during the interrogations.[7] After the third interrogation a police captain informed Reeve that one of the persons previously named by the defendant had implicated the defendant in the shooting. Officer Reeve did not thereafter interrogate the defendant.

Further police investigation centered primarily on interviewing the persons mentioned by the defendant in his statements to Officer Reeve. It was determined that on October 2 the defendant and his friend, Jimmy Sanchez, burglarized an apartment and obtained three guns, including a shotgun. They

fired the guns in a nearby field. Sanchez then went to the home of his aunt, Kathy Johnson, where the defendant had been living. The defendant in the meantime went somewhere to hide the guns. Shortly after their separation the defendant arrived at the Johnson house with the weapons. He told Sanchez and some other friends who were there that he had just shot someone. The defendant and his friends then drove to Van Diest Park to play football. On the way the defendant admitted the shooting several times and at one point threw a handful of ammunition outside the car window. The police obtained a search warrant for Mrs. Johnson's home and recovered the weapon used in the shooting along with other rifles and ammunition.

The court denied the defendant's motion to suppress, ruling that the Miranda warnings were not required because Officer Reeve interrogated the defendant as a witness rather than as a suspect. For similar reasons the court held inapplicable to the defendant's interrogations section 19-2-102(3)(c)(I), C.R.S. 1973 (1978 Repl. Vol. 8), which prohibits the admission of a child's statement unless the child's parent or an attorney acting in the child's behalf was present at such interrogation and the child and parent, if present, were advised of the child's constitutional rights.[8]

The case proceeded to a jury trial and the defendant's statements to Officer Reeve were admitted into evidence, as well as the bullets re-

covered by Reeve and the weapon seized from Mrs. Johnson's home. The prosecution also called as witnesses several persons named by the defendant in the course of his statements to Reeve. During the direct examination of the victim's wife, Donna Larmore, the prosecutor, over the defendant's objection, asked her what happened to her after her husband was pronounced dead at the hospital. She responded "Well, I felt sick, and I went home and miscarriaged my child." The court ordered the question and answer stricken, instructed the jury to disregard this testimony, and denied the defendant's motion for a mistrial.

It was the defendant's theory that the victim was shot accidentally by a ricocheting bullet fired by him in a

field near the route Mr. Larmore was walking on his way home. The court submitted to the jury alternative verdict forms of murder in the first degree after deliberation or by extreme indifference. The lesser offenses of second degree murder,[9] reckless manslaughter,[10] and criminally negligent homicide[11] were also submitted to the jury. The jury returned a general verdict of guilty to murder in the first degree resulting in a sentence of life imprisonment.

II. Extreme Indifference Murder

Since the defendant's conviction of first degree murder was by a general verdict after instructions on first degree murder after deliberation and first degree murder by extreme indifference, we are unable to determine which form of first degree murder is

represented by the jury's verdict. Under these circumstances a constitutional infirmity in either form of first degree murder would require a reversal of the defendant's conviction. In People v. Marcy, supra, we recently held that the statutory definition of extreme indifference murder violates equal protection of the laws under Article II, Section 25, of the Colorado Constitution because that crime is not sufficiently distinguishable from second degree murder to warrant the substantial differential in penalty authorized by the statutory scheme. Accord, People v. Gurule, ___ Colo. _____, _____ P.2d _____ (1981)(S. Ct. No. 80SA310, announced May 4, 1981); People v. Curtis, _____ Colo. _____, _____ P.2d _____ (1981)(S. Ct. No. 80SA58, announced March 30, 1981).

Accordingly, the defendant's conviction of murder in the first degree must be reversed.

The reversal of a conviction based on an offense that is constitutionally deficient as substantially indistinguishable from conduct proscribed by a less serious offense does not necessarily require a new trial. As we observed in People v. Curtis, supra:

> "On prior occasions where all the elements of the lesser offense were proved by competent evidence and were included in the jury's verdict of guilty to the more serious but constitutionally infirm crime, we have vacated the conviction and remanded with directions to enter a judgment of conviction on the lesser offense and to resentence the defendant. People v. Dominguez, 193 Colo. 468, 568 P.2d 54 (1977); People v. Horrocks, 190 Colo. 501,

549 P.2d 400, (1976); People v. Webb, 189 Colo. 400, 542 P.2d 77 (1975); People v. Bowers, 187 Colo. 233, 530 P.2d 1282 (1974)."

However, such a disposition is not appropriate here because other errors mandate a new trial.

III. The Defendant's Statements and Derivative Evidence

In denying the defendant's motion to suppress, the trial court attached no significance to the custodial aspect of the interrogations which occurred during the two day period following the arrest but, instead, resolved the motion on the basis that the police during this period did not consider the defendant a suspect in the shooting. The trial court's ruling places an interpretation on Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966),

that undercuts its rationale and nullifies the safeguards of section 19-2-102(3)(c)(I), C.R.S. 1973 (1978 Repl. Vol. 8).

Briefly stated, the holding of the United States Supreme Court in Miranda v. Arizona, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706-07, is that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates that the defendant has been adequately warned of his privilege against self-incrimination and his right to counsel and thereafter voluntarily, knowingly and intelligently waives those rights. The reason for the warning requirement is that, without such a safeguard, the compelling pressures inherent in police

custody "work to undermine the individual's will to resist and to compel him to speak when he would not otherwise do so freely." Miranda v. Arizona, 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. These pressures can be virtually overwhelming in a case of a 15 year old youth. Such a person, no matter how sophisticated, "is not the equal to the police in knowledge and understanding of the consequences of... questions and answers" and "is unable to know how to protect his own interests or how to get the benefits of his constitutional rights." Gallegos v. Colorado, 370 U.S. 49, 54, 82 S. Ct. 1209, 1212, 8 L. Ed. 2d 325, 328 (1962). For this reason section 19-2-102(3)(c)(I) of the Colorado Children's Code requires the presence of a parent, legal

guardian, or attorney during the advisement of rights and any ensuing interrogation as an additional and necessary assurance that the privilege against self-incrimination will be fully afforded to the juvenile. E.g., People v. Saiz, _____Colo._____, 620 P.2d 15 (1980); People v. Maes, 194 Colo. 235, 571 P.2d 305 (1977).

Under Miranda, therefore, the decisive stage for the warnings is custodial interrogation. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. at 444, 86 S. Ct. at 612, 16 L. Ed. 2d at 706. There is no dispute here that the

defendant was in police custody. See Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969). The People seek to justify noncompliance with Miranda and section 19-2-102(3)(c)(I) by arguing that the defendant was not an actual suspect at the time of the interrogation and, therefore, he was not interrogated within the intended sense of Miranda. We reject this argument as legally unsound.

The privilege against self-incrimination "not only extends to answers that would in themselves support a conviction...but likewise embraces those which would furnish a link in the chain of evidence...." Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118, 1124 (1951); accord, e.g., Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969);

Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). Interrogation occurs when the police use words or engage in actions that are reasonably likely to evoke an incriminating response from the defendant. Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); People v. Lowe, _____Colo._____, 616 P2d 118 (1980). The critical inquiry in this case is not whether the police considered the defendant a suspect but, rather, whether the defendant, while in police custody, was exposed to a risk of self-incrimination by police interrogation. See, e.g., Marchetti v. United States, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968); Rogers v. United States, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951).

Prior to the first interrogation there was no clearly identifiable suspect and Officer Reeve surmised that the defendant might know something about the shooting. The first interrogation resulted in the defendant admitting his knowledge of the shooting, including the location of the weapon. Prior to the second interrogation the police had been informed that the defendant resembled the description of a young black male who was seen carrying a rifle case in the area of the shooting. During the second interrogation the defendant implicated himself further in the shooting by admitting that he disposed of bullets at the request of "Bug". Prior to the third interrogation the defendant actually had been identified by photograph as the young black male

present in the area of the shooting when it occurred. During this last interrogation the defendant repeated his earlier statements about his knowledge of the shooting and the location of the weapon. Never having been advised of his absolute right to decline to answer any questions, the defendant's opportunity to exercise this right was illusory while, at the same time, his exposure to the risk of actual incrimination was continuous.

Reduced to its basic components, the People's argument amounts to an attempt to engraft on Miranda a focus-requirement that would reduce to constitutional insignificance the critical relationship between police custody and the privilege against self-incrimination. In Mathis v. United States, 391 U.S. 1,

88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968), where the defendant while incarcerated under a state sentence was interrogated by federal officers, the Supreme Court rejected the government's contention that the Miranda holding applies "only to questioning one who is 'in custody' in connection with the very case under investigation":

> "There is no substance to such a distinction, and in effect it goes against the whole purpose of the Miranda decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the Miranda opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody." Id. at 4-5, 88 S. Ct. at 1505, 20 L. Ed. 2d at 385.

See, e.g., Wade v. Mancusi, 358 F. Supp. 103 (W.D.N.Y. 1973)(Miranda warnings required prior to interrogation where defendant in custody for offense other than that under investigation); Carter v. McGinnis, 351 F. Supp. 787 (W.D.N.Y. 1972)(Miranda warnings required where defendant incarcerated and interrogation related to prison disciplinary matter that arguably could result in criminal prosecution).[12] For purposes of Miranda, there is no basis to attribute any greater constitutional significance to the level of police suspicion toward a defendant already in custody than the significance attributed to the reason why he is in custody. Neither the absence of police suspicion nor the precise basis for custody affects in the least the principle that "under

Miranda, a person in police custody has ...an absolute right to decline to answer any question...." United States v. Mandujano, 425 U.S. 564, 581, 96 S.Ct. 1768, 1778, 48 L. Ed. 2d 212, 225 (1976). We believe Miranda's prophylactic standards, as well as the safeguards of section 19-2-103(3)(c)(I), were intended to apply to this defendant's custodial situation by affording him a full opportunity to exercise his privilege against self-incrimination in a knowing and intelligent manner.

The logic of the People's argument would subject one in police custody to unlimited interrogation on any crime, without any warning of basic constitutional rights, so long as the focus of suspicion had not yet settled on the person interrogated. We reject such an argument as contrary to the basic pur-

pose of the Miranda decision and, in the case of juveniles, as inimical to the statutory protections contemplated by section 19-2-102(3)(c)(I). The trial court erred in denying the defendant's motion to suppress his three custodial statements made on October 2 and October 3.[13]

B.

The defendant moved to suppress not only his custodial statements but also the fruits of those interrogations, including any real evidence derived directly therefrom and the testimony of witnesses whose names were furnished by the defendant during the interrogations. Having found no Miranda violation the trial court never considered the application of the derivative evidence rule to these separate evidentiary items.

Once it is determined that a statement was improperly obtained in violation of Miranda, not only must the statement be suppressed but also evidence subsequently acquired may be suppressible as the fruit of the illegal interrogation. E.g., Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L. Ed. 2d 1047 (1968); People v. Founds, _____Colo._____, 621 P.2d 325 (1981); People v. Saiz, supra; People v. Lowe, supra. In situations involving successively invalid statements by a defendant or real evidence derived from an unlawful interrogation, the derivative evidence rule generally requires the prosecution to establish that the challenged evidence was obtained from an independent source, or that the connection between the initial illegality

and the evidence has become so attenuated as to dissipate the initial taint. E.g., People v. Founds, supra; People v. Lowe, supra.

Additional considerations are applicable to this case, where the alleged fruit of the Miranda violation is the trial testimony of witnesses whose identities were disclosed in the course of an unlawful interrogation of the defendant. The source of trial testimony often lies in the free choice of the witness to give evidence in the case. "Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition." United States v. Ceccolini, 435 U.S. 268,

276, 98 S. Ct. 1054, 1060, 55 L. Ed. 2d 268, 277 (1978). it is not unreasonable to assume that under ordinary circumstances the decision of a witness to testify will arise from an independent source unrelated to the official misconduct. Even where the road between the constitutional violation and the witness is direct, there well might be sufficient attenuation to permit the witness to testify.[14] "The degree of free will necessary to dissipate the taint will very likely be found more often in the case of live witness testimony than other kinds of evidence." United States v. Ceccolini, 435 U.S. at 276-77, 98 S. Ct. at 1060, 55 L. Ed. 2d at 277. As an alternative to a showing of independent source or sufficient attenuation the prosecution might be able to

demonstrate, as a basis for admission, that the witnesses and their testimony inevitably would have been discovered in the normal course of police investigation. E.g., United States v. Seohnlein, 423 F.2d 1051 (4th Cir. 1970), cert. denied, 399 U.S. 913, 90 S. Ct. 2215, 26 L. Ed. 2d 570 (1970); Wayne v. United States, 318 F.2d 205 (D.C. Cir. 1963), cert. denied, 375 U.S. 860, 84 S. Ct. 125, 11 L. Ed. 2d 86 (1963).

The trial court on remand should apply these principles to the challenged evidence and, in accordance with the derivative evidence rule, make appropriate determinations of admissibility.

III. Prosecutorial Misconduct

The infirmity in the trial proceedings was exacerbated by the prosecutor's

elicitation of prejudicial and totally irrelevant evidence of the miscarriage suffered by the victim's wife, Mrs. Larmore, upon her husband's death. The trial court's cautionary instruction to the jury is not sufficient under these circumstances to offset the inflammatory nature of this testimony and its likely effect on the jury's deliberations. There are some cases "in which the risk that the jury will not, or cannot, follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123, 135, 88 S. Ct. 1620, 1627, 20 L. Ed. 2d 476, 485 (1968). This being such a case, the defendant's motion for a mistrial should have been granted.

The record discloses that defense counsel unsuccessfully objected to the prosecutor's attempt to establish the general physical condition of Mrs. Larmore on the day of the shooting. After eliciting testimony that she was four months pregnant on that day, the prosecutor then questioned her, over the defendant's objection, about learning of her husband's death and concluded his direct examination with the testimony about her miscarriage. In the context of this record it strains credulity to view the elicitation of this testimony as the product of inadvertence or mistake. Considering its patent irrelevancy to the charges and its vast potential for prejudice, we view the presentation of this testimony as a thinly veiled effort to evoke the jury's

sympathy for the witness due to her loss of husband and child. Whether the prosecutor also sought by this testimony to instill in the jury's mind an ill will toward the defendant we cannot determine. Whatever the prosecutor's other motives may have been, the natural and probable consequence of such testimony was to portray the defendant to the jury as the person who not only shot the victim but also caused the death of his unborn child, a matter for which he had not been charged.[15]

Unfortunately, this is not the first time we have confronted a record depicting prosecutorial misconduct by the office of the District Attorney for the Fourth Judicial District. In People v. Ferrell, ___Colo.___, 613 P.2d 324 (1980), this same prosecutor

in summation during a murder trial implored the jury to retaliate against the defendant by finding him guilty. We noted that his statements "exceeded the bounds of proper argument and therefore cannot be condoned." ____ Colo. at ____, 613 P.2d at 326. In People v. Estep, 196 Colo. 340, 583 P.2d 927 (1978), we voiced strong disapproval of the district attorney's cross-examination of a defense witness in a manner that manifested the prosecutor's personal belief in the defendant's guilt. What we stated in People v. Goldsberry, 181 Colo. 406, 411, 509 P.2d 801, 804 (1973), is especially pertinent to the prosecutor's conduct in this case:

> "It appears from the record of this case that the district attorney was fully cognizant that the prosecution witness

> would respond in the manner she did and thus, expose to the jury inadmissible and highly prejudicial evidence. His conduct in this regard is not to be condoned. This court has repeatedly held that the duty of a prosecutor is not merely to convict, but also to see that justice is done by seeking the truth by the presentation of proper evidence. Where the prosecutor's zeal to win a case involves a clear lack of adherence to the elementary principles of fairness and legality, it can only be condemned."

A repeated pattern of overzealous prosecutorial tactics will not be tolerated. The trial court must not hesitate to impose effective and severe sanctions, if necessary, should there be a recurrence of the type of misguided zeal that eroded the fairness of the first trial. See People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1979);

People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1973); I. ABA Standards For Criminal Justice, The Prosecution Function, Standard 3-5.6(2d ed.(1980).

The judgment is reversed and the cause is remanded for a new trial, in accordance with the views herein expressed, on murder after deliberation[16] and any lesser offenses that appropriately might be submitted to the jury on retrial.

Footnotes 1-16

[1] The defendant's claims which we find unnecessary to consider include: (1) the asserted denial of his right to a unanimous verdict due to the general verdict forms of guilty and not guilty to first degree murder, without specification of the particular type of murder committed, i.e., murder after deliberation or murder by extreme indifference; (2) the trial court's denial of his motion to suppress his statements on the ground that they were involuntary; and (3) the trial court's determination that it lacked jurisdiction under section under section 19-1-104(4)(c), C.R.S. 1973 (1978 Repl. Vol. 8), to sentence the defendant as a fuvenile or to remand the case to the juvenile court for disposition.

[2] The defendant was charged as an adult pursuant to section 19-1-104(4)(b)(I), C.R.S. 1973 (1978 Repl. Vol. 8), which provides that a child may be charged with the commission of a felony when he is alleged to have committed a crime of violence defined by section 18-1-105 as a class 1 felony and is fourteen years of age or older.

[3] Section 18-3-102(1)(a), C.R.S. 1973 (1978 Repl. Vol. 8).

[4] Section 18-3-102(1)(d), C.R.S. 1973 (197[illegible] Repl. Vol. 8).

5 Officer Reeve contacted the defendant on September 29, 1978, in regard to a juvenile summons over some incident that occurred at Mitchell High School. The defendant was not a student at this school. Upon returning to the police station Reeve discovered that there was an outstanding bench warrant for the defendant's arrest. The record does not disclose the basis for the bench warrant.

6 The police later determined that the defendant was known by the nickname "Bug".

7 After taking the defendant into custody on October 2, 1978, Officer Reeve made several unsuccessful attempts to contact the defendant's father. Finally, on October 3 Reeve located the father and told him that the defendant was at the juvenile detention center, had provided information about the shooting, and would need an attorney if he became a suspect.

8 "No statements or admissions of a child made as a result of interrogation of the child by a law enforcement official concerning acts alleged to have been committed by the child which would constitute a crime if committed by an adult shall be admissible in evidence against that child unless a parent, guardian, or legal custodian of the child was present at such interrogation and the child and his parent, guardian, or legal custodian were advised of the child's

right to remain silent, that any statements made may be used against him in a court of law, the right of the presence of an attorney during such interrogation, and the right to have counsel appointed if so requested at the time of the interrogation; except that, if a public defender or counsel representing the child is present at such interrogation, such statements or admissions may be admissible in evidence even though the child's parent, guardian or legal custodian was not present.

[9] Section 18-3-103(1)(a), C.R.S. 1973 (1978 Repl. Vol. 8).

[10] Section 18-3-104(1)(a), C.R.S. 1973 (1978 Repl. Vol. 8).

[11] Section 18-3-105(1)(a), C.R.S. 1973 (1978 Repl. Vol. 8).

[12] In support of the argument that Miranda should be restricted to custodial defendants who are the focus of police suspicion for the crime under investigation, the People cite People v. Gladney, 194 Colo. 68, 570 P.2d 231 (1977); People v. Downer, 192 Colo. 264, 557 P.2d 835 (1976); and People v. Thorton, 190 Colo. 397, 547 P.2d 1278 (1976). In each of these cases, however, the interrogation took place before the defendant was arrested and the defendant simply was not in the custodial situation contemplated by Miranda. See Oregon v. Mathiason,

429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976).

13 We do not address the defendant's claim that his statements should have been suppressed as involuntary. The trial court concluded that the Miranda warnings were not applicable to the successive interrogations on October 2 and 3, and, therefore, it never reached the question of what effect the failure to warn had on the issue of voluntariness. "(The fact) that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by Miranda, is a significant factor in considering the voluntariness of statements later made." Davis v. North Carolina, 384 U.S. 737, 740, 86 S. Ct. 1761, 1764, 16 L. Ed. 2d 895, 898 (1966). Since the trial court must conduct a new hearing on the derivative evidence issue, see Part IIB, infra, it can determine at that same hearing whether, in spite of the failure to warn and the alleged promises of assistance by Officer Reeve, the defendant's statements were voluntary in the constitutional sense -- that is, the product of a rational intellect and a free will. E.g., Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). Only if the defendant's statements satisfy appropriate legal standards of voluntariness may they be used for impeachment purposes at trial.

E.g., Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

14 In Michigan v. Tucker, 417 U.S. 433, 435, 94 S. Ct. 2357, 2359, 41 L. Ed. 2d 182, 187 (1974), the Supreme Court addressed the question "whether the testimony of a witness in respondent's state court trial for rape must be excluded simply because police had learned the identity of the witness by questioning respondent at a time when he was in custody as a suspect, but had not yet been advised that counsel would be appointed for him if he was indigent." The interrogation took place prior to the court's decision in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), but the trial occurred after Miranda and that decision was applicable to the trial. After noting that the interrogating officers were "focusing on the suspect's opportunity to have retained counsel with him during the interrogation if he chose to do so," as established in Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), the Court held that the testimony of the witness should not have been excluded:

"The statements actually made by respondent to the police, as we have observed, were excluded at trial in accordance with Johnson v. New Jersey, 384 U.S. 719 (16 L. Ed. 2d 882, 86 S.Ct. 1772)(1966). Whatever deterrent effect

on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well." 417 U.S. at 447-48, 84 S. Ct. at 2365, 41 L. Ed. 2d at 195.

The principal factors on which the Court seemed to rely were the apparent good faith of the officers in conducting the interrogation, the voluntary character of the statement, and the tenuous relationship between the high cost of excluding the trial testimony of the witness and the deterrent purposes of the exclusionary rule.

15 On October 2, 1978, prior to the shooting, Mrs. Larmore had been sick and telephoned her husband at his job, asking him to come home and take her to the hospital. The shooting occurred while the husband was returning home in response to this phone call.

16 The jury's general verdict of guilty to first degree murder did not constitute an implied acquittal of murder after deliberation. Both murder after deliberation and extreme indifference murder were submitted to the jury as alternatives. Under the statutory scheme first degree murder by extreme indifference carries the same penalty as murder after deliberation and neither crime is a lesser included offense of

the other. People v. Curtis, _____ Colo. _____, _____ P.2d _____ (1981) (S. Ct. No. 80SA58, announced March 30, 1981); see also People v. Gurule, _____ Colo. _____, _____ P.2d _____ (1981) (S. Ct. No. 80SA310, announced May 4, 1981). Therefore, there is no impediment to the retrial of the defendant for murder after deliberation.

SUPREME COURT, STATE OF COLORADO
Case No. 80SA314
Appeal, District Court, El Paso County

PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

DAVID SCOTT LEE,

Defendant-Appellant.

ORDER

Upon consideration of the Petition for Rehearing filed by the Plaintiff-Appellee in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, JULY 6, 1981

Opposition

No. 81-484

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Petitioner,

vs.

DAVID SCOTT LEE,

Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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QUESTION PRESENTED FOR REVIEW

Whether the Colorado Supreme Court was correct in reversing the defendant's conviction on the grounds that certain custodial statements made by the defendant were obtained in violation of his rights under the Colorado Children's Code and the Miranda decision? People v. Lee, ___ Colo. ___, 630 P.2d 583 (1981).

STATEMENT OF THE CASE

The defendant-respondent, David Scott Lee, was convicted of first-degreee murder, and appealed directly to the Colorado Supreme Court. The Colorado Supreme Court reversed the defendant's conviction, ruling that Colorado's "extreme indifference" murder statute violated the equal protection clause of the Colorado Constitution, Article II, Section 25. The Colorado Supreme Court also determined that certain statements made by the defendant, in response to custodial interrogation by the police, should have been suppressed because the defendant had not been informed of his privilege against self-incrimination and his right to counsel, as required by this Court's decision in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), and the Colorado Children's Code, section 19-2-102(3)(c)(I), C.R.S. 1973 (1978 Repl. Vol. 8).

David Scott Lee, fifteen years old at the time of this incident was charged with first degree murder, arising out of the shooting death of William Larmore. Mr. Larmore was struck in the abdomen by a bullet which ricocheted off a hard surface while he was walking home from work. While the defendant was in custody on a different matter, the police interrogated him on three separate occasions concerning the Larmore shooting without ever informing him of his rights under the Colorado Children's Code and the Miranda decision. David Lee consistently expressed his reluctance to discuss the incident with the police, but, nonetheless, made certain statements which implicated him in the offense. Prior to trial the defendant filed a motion to suppress his statements (100-103), which the trial court denied.(345)

The facts in this case are more complex than indicated by the Petitioner, and at the hearing on the motion to suppress, the following sequence of events was established.

On September 29, 1978, Officer Henry Reeve of the Colorado Springs Police Department served a summons and complaint on the defendant regarding an incident at the defendant's high school.(418) When Reeve returned to the police station to complete the necessary paperwork to reflect his service of the summons, he learned that the defendant was wanted on a bench warrant.(418, 427) Three days later, on October 2, 1978, at approximately 6:00 p.m., Officer Reeve arrested the defendant.(429) The defendant was transported to the police station and booked.(432) While Reeve was making arrangements to have the defendant transported to the Zebulon Pike Detention center, he became aware of the shooting of Larmore that occurred earlier in the day and realized that the shooting occurred within a block of where he had arrested the defendant.(436)

Reeve returned to the detaining cell and questioned the defendant as to whether "he had any knowledge of the shooting incident."(439) The defendant replied he was familiar with what had taken place but, according to Reeve, was "reluctant to impart any information."(439, 493) Nevertheless, Reeve elicited a statement from the defendant in which he said that he was with four other boys on their way to play football when they drove near the scene of the shooting. One of the boys, known as Bug, claimed that he had shot the man.(440-442) Another of the youths, Jimmy Sanchez, told the defendant where Bug had hidden the gun.(443) Reeve promised David that if provided truthful and valuable information about the shooting, he would help him in any way possible.(456) Reeve felt he had a

friendly relationship with the defendant and thought it would "contribute to [his] ability to elicit information from him."(505)

Reeve went to the area described by the defendant to search for the gun and later had the defendant transported to the location to give additional directions.(449) No gun was located after an hour long search.(450)

Detective Gurule, who was investigating the Larmore shooting, also arrived to assist in the search.(450) Gurule obtained from Reeve a polaroid snapshot of the defendant which had been taken earlier that evening.(451) Gurule told Reeve that a man had seen a young black male in the area just before the shooting and the defendant's photo would be used in a photo lineup to be shown to the man.(531)

After the unsuccessful search for the gun, Lieutenant Dalton instructed Officer Reeve and Detective Kenda to again question the defendant.(453) Kenda and Reeve went to the detention center where the defendant was questioned for the second time about the shooting.(456) In his second statement, David gave additional information about the other boys in the group and told the police officer that he had disposed of some .22 caliber bullets at Bug's request.(458-61) The defendant again indicated his reluctance to get involved.(462)

Shortly after midnight Reeve returned to police headquarters and again spoke with Detective Gurule.(463) According to Reeve, Gurule told him that a man had selected the defendant's photos from a photo array as looking like the boy seen on the hillside around the time of the shooting.(465)

The next morning, October 3, Reeve and Detective Franzen searched the area where the defendant said he had thrown the bullets.(468)

After finding some bullets, Reeve questioned the defendant for the third time on the afternoon of October 3rd.(466)

In his third statement, the defendant gave more details about the other boys in the football group and an additional description of Bug.(464-70) The defendant also indicated that there were three more youths in the group.(469) Later in the questioning, the defendant stated to Detective Franzen that he saw Bug shoot a .22 caliber rifle in a field and then hid the weapon.(477) Again, the defendant had indicated his reluctance to discuss the shooting and expressed his concern about getting out of the detention center.(474) Both Reeve and Franzen promised to try and assist the defendant in getting out of detention.(475)

During none of these interrogations of the defendant was he ever advised of his Miranda rights.(477, 517) Indeed, Reeve told the defendant that no warnings were required since he was not a suspect.(517) Likewise, neither of David's parents were present during the three sessions of questioning although Reeve contacted the Defendant's father, Walter Lee, to inform him that David was in detention on October 3rd.(508)

The trial court denied the defendant's motion to suppress statements (556-59) ruling that the actions of the police were proper since the defendant was not a suspect during the questioning. During trial, Officer Reeve recounted all statements obtained from the defendant.(767-78)

In its decision reversing David Lee's conviction, the Colorado Supreme Court did not address the defendant's claim that his statements should have been suppressed as involuntary but, instead, remanded the case for a hearing on that issue. See People v. Lee, supra, 630 P.2d at 590, n. 13.

On remand, the trial court determined that the statements, in fact, were involuntary. (Appendix A). The trial court reasoned as follows:

> Briefly reviewing the facts that are at this time present before the Court, and in light of the Supreme Court decision, there is no question that David Scott Lee was a fifteen-year old child, poorly educated. There is no question that his initial reaction to any questioning was a request not to be questioned, that this questioning continued by Officer Reeve, that this child was promised assistance for disclosure of facts that he did not want to disclose, that he was constantly in custody.
>
> The Supreme Court has found that this is indeed a violation of Miranda, coupled with the fact that no parent nor attorney were present at any time, and that, in fact, the Miranda case was used more or less not only erroneously but in an attempt to induce statements by David Scott Lee. If these actions were not done maliciously by the police—and I don't find them to be, because I think that young Officer Reeve is indeed an honest person and was a fine police officer—there was—it was certainly done at least negligently.
>
> For these reasons then the Court will rule that the statements of David Scott Lee may not be used in any matter in the forthcoming trial against him, and this, of course, includes the Harris case. [Emphasis added]. (Appendix A, page 2).

The prosecution failed to exercise its right to an interlocutory appeal of this ruling by the trial court, and, therefore, the findings would be binding in any further appellate review of this case.

SUMMARY OF THE ARGUMENT

As the Colorado Children's Code provided adequate and independent state grounds for the Colorado Supreme Court's decision in this case, this Court lacks jurisdiction to decide this case on the merits.

In addition, the Colorado Supreme Court correctly focused its inquiry on the custodial nature of the interrogations, and the risk of self-incrimination, which is consistent with this Court's decision in the Miranda

case, and other applicable decisions by this Court. This case, therefore, presents no significant federal question for this Court's review.

Furthermore, the trial court's finding on remand from the Colorado Supreme Court, viz, that the defendant's statements were involuntary, obviates the need for further appellate review of this case.

ARGUMENT

THE COLORADO SUPREME COURT WAS CORRECT IN REVERSING DEFENDANT'S CONVICTION, ON THE GROUNDS THAT CERTAIN CUSTODIAL STATEMENTS MADE BY THE DEFENDANT SHOULD HAVE BEEN SUPPRESSED AT TRIAL SINCE THEY WERE OBTAINED IN VIOLATION OF HIS RIGHTS UNDER THE COLORADO CHILDREN'S CODE AND THE MIRANDA DECISION.

A. The Colorado Children's Code Provided Adequate And Independent State Grounds For the Colorado Supreme Court's Decision.

The Colorado Children's Code, section 19-2-102(3)(c)(I), C.R.S. 1973 (1978 Repl. Vol. 8), provides that:

> No statements or admissions of a child made as a result of interrogation of the child by a law enforcement official concerning acts alleged to have been committed by the child which would constitute a crime if committed by an adult shall be admissible in evidence against the child unless a parent, guardian, or legal custodian of the child was present at such interrogation and the child and his parent, guardian, or legal custodian were advised of the child's right to remain silent, that any statements made may be used against him in a court of law, the right of the presence of an attorney during such interrogation, and the right to have counsel appointed if so requested at the time of the interrogation; except that, if a public defender or counsel representing the child is present at such interrogation, such statements or admissions may be admissible in evidence even though the child's parent, guardian, or legal custodian was not present.

The purpose of the above-quoted statute is to provide a special protection for juveniles, in addition to the protections mandated by the Miranda decision. "This special protection provides an additional and necessary assurance that the juvenile's Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel will be fully afforded to him" People v. Maes, 194 Colo. 235, 571 P.2d 305, 306 (1977). See also People v. Saiz, 42 Colo. App. 469, 600 P.2d 97 (1979); People In Interest of L.B., 33 Colo. App. 1, 513 P.2d 1069 (1973). This section has always been strictly construed by Colorado courts. People In Interest of M.M., 43 Colo. App. 65, 599 P.2d 968 (1979). The statute is mandatory and applies "when a child is in temporary custody or under detention, as those terms are used in the Children's Code." People v. Maynes, 193 Colo. 111, 562 P.2d 756, 758 (1977). "Therefore, statements and admissions made to the police by a juvenile in the course of a criminal investigation are not admissible in evidence against a juvenile unless the special protection contemplated by the statute is provided." People v. Maes, supra.

The essential facts here are undisputed. David Scott Lee was fifteen and was in custody at the time of the three interrogations. No parent, guardian, legal custodian or attorney was present during any of the questioning. The trial court's conclusion that the defendant was not a "suspect" during the questioning is totally irrelevant. The mandatory special protection of this statute apply whenever a child is in custody. This is because:

> . . . a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him whenhe is made accessible onlyto the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the

> questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Gallegos v. Colorado, 370 U.S. 49, 54, 82 S. Ct. 1209, 8 L.Ed.2d 325 (1962).

Contrary to the Petitioner's contention, the Colorado Supreme Court based its decision in this case on both "Miranda's phophylactic standards, as well as the safeguards of section 19-2-102(3)(c)(I)." People v. Lee, supra, 630 P.2d at 590. Concerning the trial court's denial of the defendant's motion to suppress, and the trial court's failure to attach any significance to the custodial aspect of the interrogation, the Colorado Supreme Court stated:

> The trial court's ruling places an interpretation on Miranda v. Arizona, [supra], that undercuts its rationale and nullifies the safeguards of section19-2-102(3)(c)(I) . . . .

Id., 630 P.2d at 588. Furthermore, the Colorado Supreme Court rejected the State's argument, that a person in police custody may be subjected to unlimited interrogation without informing them of their constitutional and statutory rights so long as they are not a suspect, as being "contrary to the basic purpose of the Miranda decisoin and, in the case of juveniles, as inimical to the statutory protections contemplated by section 19-2-102(3)(c)(I)". Id., 630 P.2d at 590. Since the defendant in this case is a juvenile, it is abundantly clear that the Colorado Supreme Court based its decision, in substantial part, on the requirements of the Colorado Children's Code.

This Court has repeatedly held that if a state court judgment rests upon two grounds, one of which is federal and the other nonfederal, this

Court does not have jurisdiction of an appeal if the nonfederal ground is adequate to support the judgment. See Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed.2d 429 (1874); Jankovich v. Indiana Toll Road Commission, 85 S. Ct. 493, 379 U.S. 487, 13 L.Ed.2d 439 (1965). Since the Colorado Children's Code providesadequate independent state grounds for the Colorado Supreme Court's decision in this case, this Court lacks jurisdiction to exercise its extraordinary power of review in this case.

B. The Colorado Supreme Court's Decision Was Based Upon A Correct Interpretation Of The Applicable Decisions Of This Court, And No Significant Federal Question Is Presented For This Court's Review

The Petitioner observes that the issue which they have presented "has not yet been addressed by this honorable court." However, the fact that a given question has not been resolved by this Court has never been a recognized basis for granting certiorari.

The only real question raised by Petitioner turns on the particular facts of this case. Respondent submits that the Colorado Supreme Court's decision was based upon an accurate understanding of the facts in this case and a correct interpretation of the applicable decisions of this Court. Furthermore, the result reached by the Colorado Supreme Court was a fair result, given the level of police andprosecutorial overreaching in this case.

The defendant was subjected to custodial interrogation on three separate occasions, and Officer Reeve claimed that during all of the interrogations he considered David Lee to be merely a witness, and not a suspect. At no time was the defendant advised pursuant to Miranda. The trial court concluded that no warnings were required since the defendant was not a suspect during questioning. The defendant submits that he was

more of a suspect, from the very outset, than the police officer would admit. Certainly, Mr. Lee must have been a suspect prior to the second interview since Officer Reeve knew that a witness had seen a young black male similar in description to Mr. Lee carrying a rifle case in the area of the shooting, and Officer Reeve had supplied a photograph of Mr. Lee to be placed in a photographic lineup. In addition, during the second interview, when the defendant expressed reluctance to talk, detective Kenda informed him that he was involved.(518) There can be no doubt that Mr. Lee was a suspect prior to the third interrogation, since he had been identified as the young black male who had been seen in the area of the shooting.

Regardless of whether or not Mr. Lee was a suspect, the Colorado Supreme Court correctly focused its inquiry on the custodial aspect of the interrogations, and the defendant's exposure to the risk of self-incrimination by the police interrogations.

The often quoted language of the landmark Miranda decision provides:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Miranda v. Arizona, 384 U.S. at 478.

"[U]nder Miranda the vital question is custody, not whether the investigation has focused on the person interrogated (citations omitted), and it is immaterial that the questioning relates to a crime other than the one which triggered the custody and is investigatory as far as that offense is concerned." In re James M., 72 Cal. App.2d 133, 139 Cal. Rptr. 902 (1977).

Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L.Ed.2d 381 (1968), is dispositive. While the defendant was serving a state sentence he

was questioned by a government agent as part of a routine tax investigation. That investigation later lead to criminal charges for which the Defendant was convicted. In reversing the defendant's conviction the Court stated in words controlling here:

> The Government also seeks to narrow the scope of the Miranda holding by making it applicable only to questioning one who is "in custody" in connection with the very case under investigation. There is no substance to such a distinction, and in effect it goes against the whole purpose of the Miranda decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the Miranda opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody. (Emphasis added) Id. at 4-5.

In Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612, 48 L.Ed.2d 1 (1976), this Court unequivocably stated that:

> . . . Miranda was grounded squarely in the Court's explicit and detailed assessment of the peculiar "nature and setting of . . . in-custody interrogation," 384 U.S., at 445. That Courts of Appeals have so read Miranda is suggested by Chief Judge Lumbard in United States v. Caiello, 420 F.2d 471, 473 (CA2 1969):
>
> > "it was the compulsive aspect of custodial interrogation, and not the strenth or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the Miranda requirements with regard to custodial questioning."
>
> Mathis v. United States, supra, directly supports this conclusion in holding that the Miranda requirements are applicable to interviews with Internal Revenue agents concerning tax liability, when the subject is in custody; the Court thus squarely grounded its holding on the custodial aspects of the situation, not the subject matter of the interview. (Emphasis by Court). Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612, 48 L.Ed.2d 1 (1976).

See also Wade v. Mancusi, 358 F. Supp. 103 (W.D.N.Y., 1973); United States v. Harrison, 265 F. Supp. 660 (S.D.N.Y. 1967); Constantine v. People, 178 Colo. 16, 495 P.2d 208 (1972) and People v. Woodberry, 265 Cal. App. 2d 351, 71 Ca. Rptr. 165 (1968).

Furthermore, in the recent case of Rhode Island v. Innis, 446 U.S. 241, 300-301, 100 S. Ct. 1682, 64 L.Ed.2d 297 (1980), this Court concluded that "the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."

As the Colorado Supreme Court's decision was based upon a correct interpretation of the applicable decisions of this Court, no reason exists for this Court to exercise its discretionary power of review in this case by Writ of Certiorari.

C. The Trial Court's Finding On Remand From The Colorado Supreme Court (Viz., That The Defendant's Statements Were Involuntary), Obviates The Need For Further Appellate Review Of This Case.

In its decision in this case, the Colorado Supreme Court directed the trial court to determine whether, in spite of the failure to inform the defendant of this privilege against self-incrimination and his right to counsel, the defendant's statements were involuntary in the constitutional sense—that is, the product of a rational intellect and a free will—, and, therefore, admissible for impeachment purposes. People v. Lee, supra, 630 P.2d at 590, n. 13, See Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L.Ed.2d 290 (1978); Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971).

This Court has recognized that "coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206, ___ S. Ct. ___, ___ L.Ed.2d ___ (1960). The trial court expressly found that David Lee's statements were involuntary on the following grounds: the defendant was a "fifteen-year old child, poorly educated"; the defendant's "initial

reaction . . . was a request not to be questioned," but the questioning continued; "this child was promised assistance for disclosure of facts that he did not want to disclose"; "he was constantly in custody"; and "no parent or attorney were present at any time" during the questioning. (Appendix A, p. 2). The prosecution failed to challenge the propriety of the trial court's findings by way of an interlocutory appeal to the Colorado Supreme Court; therefore, the trial court's findings would be binding in any further appellate review of this case. See Colorado Appellate Rules, Rule 4.1. Consequently, the question presented by Petitioner has lost its significance and is moot. Since the defendant's statements cannot be admitted in evidence as being involuntary, there is no reason for this Court to exercise its discretionary power of review in this case.

CONCLUSION

As stated above, there is no compelling reason for this Court to exercise its discretionary power of review by Writ of Certiorari in this case. The Colorado Children's Code provides an adequate independent state ground for the Colorado Supreme Court's decision. Furthermore, the Colorado Supreme Court based its decision on a correct interpretation of the applicable decisions of this Court. Lastly, the trial court's finding, that the defendant's statements were involuntary, makes the issue presented by Petitioner a moot question.

Therefore, Defendant-Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari filed in this case.

Respectfully submitted,

J. GREGORY WALTA
Colorado State Public Defender

Norman R. Mueller

NORMAN R. MUELLER
Special Deputy State Public Defender

GERALD E. PIPER
Deputy State Public Defender

ATTORNEYS FOR DEFENDANT-RESPONDENT
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Denver, Colorado 80203
866-2665

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Colorado, was duly served upon Robert L. Russel, District Attorney, Fourth Judicial District, and David H. Zook, Chief Deputy District Attorney, by despositing it in the United States Mails, postage prepaid, addressed as follows, this 30th day of November, 1981:

Robert L. Russel, District Attorney
David H. Zook, Chief Deputy District Attorney
El Paso County Judicial Building
20 East Vermijo, #310
Colorado Springs, Colorado 80903

Norman R. Mueller

EL PASO COUNTY DISTRICT COURT, STATE OF COLORADO

Criminal Action #27933, Division 4

RULING OF THE COURT

THE PEOPLE OF THE STATE OF COLORADO,

vs.

DAVID SCOTT LEE, Defendant.

BE IT REMEMBERED, the above-entitled matter came on for hearing before the HONORABLE WM. E. RHODES, Judge, in Division 4 of the El Paso County Judicial Building, Colorado Springs, Colorado, beginning on September 28, 1981, Royal Martin, Chief Deputy District Attorney, appearing for the People, and Greg Walta, State Public Defender, appearing for the defendant.

WHEREUPON, the following proceedings (excerpt) were had and entered of record on September 29, 1981:

THE COURT: At the onset I think it only proper to say that the Court has been impressed by the arguments and law presented by both counsel in this case, it being acknowledged to be extraordinarily difficult questions both in law and in fact.

There are two principal questions as I see it to be addressed. The first is whether the initial statements

made by the defendant were voluntary. The Court finds that indeed the statements made by David Scott Lee were involuntary.

Briefly reviewing the facts that are at this time present before the Court, and in light of the Supreme Court decision, there is no question that David Scott Lee was a fifteen-year old child, poorly educated. There is no question that his initial reaction to any questioning was a request not to be questioned, that this questioning continued by Officer Reeve, that this child was promised assistance for disclosure of facts that he did not want to disclose, that he was constantly in custody.

The Supreme Court has found that this is indeed a violation of Miranda, coupled with the fact that no parent nor attorney were present at any time, and that, in fact, the Miranda case was used more or less not only erroneously but in an attempt to induce statements by David Scott Lee. If these actions were not done maliciously by the police--and I don't find them to be, because I think that young Officer Reeve is indeed an honest person and was a fine police officer-- there was -- it was certainly done at least negligently.

For these reasons then the Court will rule that the statements of David Scott Lee may not be used in any manner in the forthcoming trial against him, and this, of course, includes the Harris case.

The more difficult problem to me is the question

of suppression of derivative evidence. Justice Quinn, who wrote the Supreme Court decision, clearly invited at Page 17 the People demonstrate " ... as a basis for admission, that that the witnesses and their testimony inevitably would have been discovered in the normal course of police investigation." I will go into detail as to what I have found that the People have presented, but the main question, in seriousness of this, is whether the polices' misuse of statements of Lee by Officer Barry did in fact so taint as to exclude any derivative evidence.

The law as I understand it, and as stated also in the brief of the defendant, clearly indicates that the inevitable discovery rule may be presented by the People, who did so. I think all the evidence that was before the Court clearly to me indicated that Mr. Pereira would have given his suspicions as to the initial burglary to the police by at least Sanchez if not Sanchez and Lee. When we consider that, if either of these individuals, or both, would have been disclosed to the police -- and were not probably because of the extremely fast methods, although erroneously, that the police used -- it seems clear that that case would have been broken at that juncture.

Probably the most impressive witness to this Court was the mother of Mr. Sanchez who was disclosed this information clearly the next morning by her son. After being initially

upset and wanting to discuss this with her husband, she did detail that she would have disclosed this to the police or insisted that her son do so. This is indeed, I think, testimony as to the inevitable discovery of this information by the authorities. This is, of course, coupled by other evidence from other mothers involved, that they too would have disclosed this evidence to the police, and the conclusive evidence before me during this last two days has been that there has been an independent source for discovery during normal routine procedure.

Mr. Walta makes a very convincing argument that because of Officer Barry stating to one of these young Chicanos what was erroneous, that that tainted the evidence. It may well do so, however at this juncture there is no evidence before this Court to that degree. We have no knowledge of what conversations at that juncture took place by and between five or six young Chicanos that were involved in this matter, and whom allegedly David Scott Lee confessed to. At least I recall that, I believe, from the last trial. We only have an assumption that their discussions led to a taint, and we have no evidence at this juncture of this, and to exclude evidence in a homicide case of this nature on the basis of assumptions would indeed be error on my part. I am fully aware that it is going to create difficulties for the defendant in preparation for trial. It may bring to Mr. Walta the

problem of somehow showing that the Chicanos witnesses' statements were tainted and rendered less worthy because of the discussions they may or may not have had. Our rules of evidence, however, allow cross examination, allow discovery, and certainly allow other methods for defense counsel to indeed prepare his theory of the case, and until such time as the jury disbelieves the credibility of these witnesses because of collusion, or because of a so-called tainting, it would be improper for the Court to so rule.

In conclusion I find that the derivative evidence can come in if properly proven by the People on the basis of inevitable discovery, and that the weight of this evidence should be considered by the jury such as any other evidence. This would include of necessity discovery of the various witnesses, Lovato, et cetera, and the physical evidence which was disclosed by their independent statements, and would have inevitably been discovered by the police department.

Are there any questions of counsel?

MR. WALTA: I have no questions.

MR. MARTIN: No questions.

THE COURT: And my compliments on a very well presented argument. Stand in recess.

(End of proceedings.)

A true and correct transcript (Excerpt). Lee Harms

Lee Harms, C.S.R.

No. 81-484

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Petitioner, vs. DAVID SCOTT LEE, Defendant-Respondent.	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Defendant-Respondent, David Scott Lee, moves this Court for leave to proceed in forma pauperis, without payment of filing fees or other costs pursuant to Supreme Court Rule 46, and 28 U.S.C. § 1915. As grounds therefor, Defendant-Respondent states that:

1. Defendant was convicted of first degree murder, and appealed his conviction to the Colorado Supreme Court. In an opinion issued on June 15, 1981, the Colorado Supreme Court reversed the defendant's conviction and remanded the case for a new trial. People v. Lee, ___ Colo. ___, 630 P.2d 583 (1981).

2. On September 4, 1981, a petition for writ of certiorari was filed in this Court to review the decision of the Colorado Supreme Court. Thereafter, this Court directed that a response to the petition be filed.

3. Defendant was granted leave to proceed in forma pauperis in the trial court and also in his appeal to the Colorado Supreme Court.

4. Defendant is currently incarcerated in the El Paso County Jail, and, as the attached affidavit indicates, he has never been employed.

5. Defendant is totally indigent and does not have the requisite funds to retain an attorney and pay the costs of duplicating and filing his brief in opposition to the petition for writ of certiorari filed in this case.

For the foregoing reasons, Defendant-Respondent requests this Court to grant him leave to proceed in forma pauperis in this case.

Respectfully submitted,

Norman R. Mueller

NORMAN R. MUELLER
Special Deputy State Public Defender
Attorney for Defendant-Respondent
1575 Sherman Street
Denver, Colorado 80203
866-2665

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Petitioner, vs. DAVID SCOTT LEE, Defendant-Respondent.	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, David Scott Lee, being first duly sworn, depose and say that I am the Defendant-Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?
No.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
N/A.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
Never employed.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No.

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

N/A.

3. Do you own any cash or check or savings account?

No.

a. If the answer is yes, state the total value of the items owned.

N/A.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

a. If the anwer is yes, describe the property and state its approximate value.

N/A.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

David Scott Lee
DAVID SCOTT LEE

Subscribed and sworn to before me this 20th day of November, 1981.

My Commission Expires: August 22, 1984

Donnie Lou Todd
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Motion for Leave to Proceed in Forma Pauperis was duly served upon Robert L. Russel, District Attorney, Fourth Judicial District, and David H. Zook, Chief Deputy District Attorney, by depositing it in the United States Mails, postage prepaid, addressed as follows, this 30th day of November, 1981.

Robert L. Russel, District Attorney
David H. Zook, Chief Deputy District Attorney
El Paso County Judicial Byilding
20 East Vermijo, #310
Colorado Springs, CO 80903

Norman R. Mueller